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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

JACK FRENCH, ROBERT M. WEST, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this highly publicized, multibillion dollar litigation of national significance, the District Court certified a settlement class and approved an enormous settlement reached by the parties that is protective of the rights of class members, without determining whether each of the requisite elements of Rule 23 was satisfied for purposes of certifying a litigation class. The Court of Appeals rejected this approach to settling large, complex class actions and explicitly put itself in conflict with several other Circuits. Two questions are presented by the Court of Appeals' controversial ruling:

I. Whether a District Court may certify a class for purposes of settlement and approve a settlement of a class action suit that is fair and adequate without first deciding on the merits the separate issue of class certification for purposes of litigation under Federal Civil Rule 23?

II. What is the proper legal test under Rule 23(e) for trial courts and appellate courts to apply in determining whether to approve a class action settlement reached by the parties?

PARTIES TO THE PROCEEDING

Petitioner General Motors Corporation was defendant-appellee in Civil Action No. 92-CV-06450 and in Civil Action No. MDL-961 below. These civil actions were class action suits that were either filed in the United States District Court for the Eastern District of Pennsylvania or transferred to that court pursuant to an order issued by the Judicial Panel on Multidistrict Litigation. The named plaintiffs in these cases are all owners of certain pickup trucks manufactured by General Motors Corporation in model years 1973 to 1991.

The named plaintiffs in these cases who were appellants below were Jack French, Robert M. West, Charles E. Merritt, Gary Blades, Dawn Best, Tracey Best, Gary Barnes, Jackie Barnes, Betty Marteni, John Southards, Mary Southards, Edmund Berning, Dale W. Plummer, Edmund Casey, Anneta Casey, John Yonki, Connie Yonki, Carl Corona, Cathryn Corona, Dallas Nelson, Patricia Nelson, Mynard Duncan, Mildred Duncan, Kirby L. Stegman, Dewayne Anderson, Morris Betzold, and Barbara Betzold; the State of New York; the Commonwealth of Pennsylvania; the City of New York; the Parish of Jefferson, Louisiana; Elton Wilson and Frank I. Owen; and Betty Youngs, Barbara Phillips, Margaret Engel, Larry Swope, Robbin Maxwell, and the Center for Auto Safety. The named plaintiffs in these cases who were appellees below were Dennis Acuma and John E. Martin; John Mayhall, Brendan Hayes, Jimmy Benson, Jimmy Haddock, Dennis Nabors, and Marsha Baldwin; William A. Lewis, David Grubbs, Raymond Carver, Robert A. Flowers, Stone Ridge Agri, Inc., James McKinnish, and Douglas A. Livingston; and Johnny S. Martinez and Joseph St. Clair. The other named plaintiffs are Rudolph Jenkins, William D. Cunningham, Mather Johnson, Forrest Charles Ginn, Buren William Jones, and Martin D. Parkman.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of *certiorari* to review the judgment entered by the United States Court of Appeals for the Third Circuit in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, which has not yet been reported, is reprinted in the Appendix ("App.") to this petition at 1a-112a. The Third Circuit's opinion reversed an order and opinion of the United States District Court for the Eastern District of Pennsylvania, which approved a settlement reached by the parties of plaintiffs' consolidated class action suits. The District Court's opinion is

reported at 846 F. Supp. 330 (E.D. Pa. 1993) and reprinted at App. 113a-140a. The Third Circuit subsequently entered an order on May 16, 1995, which stayed the mandate in this case until June 29, 1995, pursuant to Federal Rule of Appellate Procedure 41(b), pending the filing of a petition for a writ of *certiorari* in this Court. *See* App. 165a.

STATEMENT OF JURISDICTION

The Court of Appeals for the Third Circuit issued its opinion on April 17, 1995. *See* App. 111a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

REGULATORY PROVISION INVOLVED

Rule 23 of the Federal Rules of Civil Procedure provides in pertinent part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits. . . .

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT OF THE CASE

This case involves the settlement of a nationwide class action. After a full evidentiary hearing, the District Court carefully approved the settlement as reasonable, finding that the plaintiff class members received something of real value; that their claims were likely worth nothing; and that the settlement compromised no interests of the class members other than their highly dubious claim for economic damages. The Court of Appeals reversed: it first held that the District Court erred in not determining that the class certified here, *for settlement purposes only*, satisfies the requirements for certification as a litigation class under Rule 23; the Court of Appeals then proceeded to substitute its own judgment for the District Court's findings under Rule 23(e) with respect to the fairness and adequacy of the settlement.

As we demonstrate below, this case creates a circuit split regarding *both* (i) whether a district court is precluded from approving any settlement of a class action suit until it first has decided on the merits the separate issue of class certification for purposes of litigation under Rule 23 *and* (ii) the proper legal test and degree of scrutiny that a trial court should apply in deciding whether to approve a proposed settlement as fair and adequate under Rule 23(e). In addition, the Court of Appeals' decision badly undermines the important rule that reviewing courts may not substitute their own (nonevidentiary) speculation for record evidence and trial court factual findings on the reasonableness of a proposed settlement. If left undisturbed, the decision below will prevent parties from settling class action suits without first spending years battling over the contentious and often complex issue of class certification for purposes of full-fledged litigation.

1. This case involves twenty-five purported class action complaints against petitioner General Motors Corporation ("General Motors") that were transferred by the Judicial Panel on Multidistrict Litigation to the Eastern District of Pennsylvania for consolidated pretrial proceedings. In each of the cases, the plaintiffs -- who are owners of 1973-1991 General Motors full-sized pickup trucks and chassis cabs ("C/K pickups") -- claim that their C/K pickups are defective because

the fuel tank is mounted on the outer side of the main frame rails of the vehicle. Plaintiffs allege that the C/K pickups are more prone to post-collision fires in side-impact accidents because of the location of the fuel tanks. App. 113a.

Significantly, none of the plaintiffs contends that he has been injured in an accident involving a C/K pickup (each of which is 5 to 23 years old) or that his truck has malfunctioned in any way. Indeed, the consolidated class action complaints specifically exclude all claims for personal injury and wrongful death. App. 114a. Instead, the complaints seek compensatory and punitive damages only for *economic losses* the plaintiffs claim to have suffered by reason of the supposed diminution in the value of their trucks allegedly caused by the supposed defect. The complaint also seeks injunctive relief, including a court-ordered recall and repair of the trucks. The causes of action alleged in the consolidated complaint are under the Lanham Trademark Act, 15 U.S.C. § 1125(a), and the Magnuson-Moss Warranty Act, 15 U.S.C. § 23(d)(1), as well as a variety of state law claims, including negligence, fraud, breach of written and implied warranty, and violation of state consumer laws. App. 113a-114a.

2. Before any settlement was discussed, the parties conducted extensive discovery. App. 119a. The District Court specifically found that court-appointed lead plaintiffs' counsel reviewed "over 300,000 pages of documents, over 100 volumes of deposition testimony, numerous volumes of trial testimony and several dozen videotapes of testimony and crash testing" from various personal injury actions against General Motors that have been litigated across the country. *Id.* 119a. In addition, the court found that plaintiffs' counsel had reviewed the voluminous record compiled by the National Highway Traffic Safety Administration ("NHTSA"), which, during the entire time this case was pending in the District Court, was conducting an investigation into the safety of the C/K pickups. *Id.*

3. After this substantial discovery and extensive negotiations between General Motors and plaintiffs' counsel, the parties reached a settlement. Under the terms of the settlement, members of the settlement class will receive a

$1,000 certificate redeemable for fifteen months toward the purchase of a new GMC or Chevrolet light-duty truck. The $1,000 certificate can be used in conjunction with any other General Motors incentive program and can be used toward the down payment of any eligible light-duty truck. In addition, the certificates are transferable at their full value either to family members or to unrelated third-party purchasers of any eligible vehicle. A settlement class member can also elect to sell the certificate alone (without the truck) to any third party, whereupon the certificate is worth $500 toward a new C/K pickup. App. 115a-116a.

In exchange for the certificates, the settlement agreement provides for the dismissal with prejudice of all claims alleged in the consolidated class action complaints. The settlement does not, however, dismiss any claims that class members may have, now or in the future, for personal injury or death. Nor did the settlement in any way affect the rights of settlement class members to participate in any action that General Motors might take pursuant to any NHTSA-ordered recall or repair action under the National Traffic and Motor Vehicle Safety Act of 1966. App. 116a.

4. On July 12, 1993, the terms of the settlement were reviewed with the District Court. On July 20, 1993, the court made a preliminary determination that the settlement appeared sufficiently fair, reasonable, and adequate to allow the parties to disseminate notice to a proposed settlement class. On the same day, the court certified, *for settlement purposes only*, a settlement class consisting of "all persons or entities who purchased in the United States (except for the residents of Texas) and are owners as of July 19, 1993, of a 1973 to 1987 GM C/K full size pickup truck or 1987 to 1991 GM R/V pickup truck." App. 114a. Individual court-approved notices were mailed at General Motors' expense to registered owners of C/K pickups, and the court-approved notice was published in *USA Today* and the *Philadelphia Inquirer*. *Id.* 118a.

5. In response to the individual and published notice, a comparatively tiny number (6,450) of the approximately 5,700,000 settlement class members -- approximately one-tenth of one percent of the class -- objected to the settlement. A

similarly small number (5,203) opted out of the settlement class, thus retaining all of their individual claims that had been raised in the class action complaints. App. 119a. Even of this negligible number, many of the "objectors" complained not about the terms of the proposed settlement, but rather about the *underlying merits* of the class action brought by the plaintiffs. R. 919, 931-32. Similarly, some of those who opted out of the settlement class made clear that they were entirely satisfied with their C/K pickups and did not want to participate in any action against General Motors. *Id.* 919, 929 n.5. In contrast to the small number of objectors, approximately *seven times* as many class members (approximately 44,800) responded by designating family members to receive the $1,000 certificate, even before the District Court had approved the proposed settlement. App. 119a.[1]

6. On September 15, 1993, plaintiffs filed an application for final approval of the settlement by the District Court. On October 26, 1993, the court conducted a hearing concerning the fairness and adequacy of the proposed settlement, pursuant to Rule 23(e). Before and during that hearing, General Motors submitted extensive evidence and briefing demonstrating the risks that the plaintiffs faced in maintaining class treatment of their claims, in establishing liability, and in establishing any damages whatsoever. General Motors also presented evidence indicating that no "retrofit" of the vehicle was either necessary or feasible. App. 135a-136a. In opposition to General Motors' extensive evidentiary presentation, objectors presented the affidavit of an Alabama garage operator who proposed undeveloped and untested "fixes" of the alleged defect that could not be done on most of the vehicle models covered by the proposed settlement. R. 1927-29.

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[1] This number is all the more remarkable because at that juncture, only out-of-household family members could be designated as recipients of the certificates. At a later point, class members are to be permitted to designate in-household family members as recipients, which likely will yield an even higher number of additional designations.

In addition, in further support of the settlement, the named plaintiffs presented the expert testimony of Dr. Itmar Simonson, a professor of economics at Stanford University whom the District Court found to be "a noted authority in the field of perceived value." App. 127a. Based on market research poll data relating to the likelihood that class members would take advantage of the certificates, and based on further economic and statistical analysis, Dr. Simonson concluded that the economic value of the settlement was between $1.824 billion and $2.024 billion. The objectors presented no assessment of the settlement's value. *Id.* 127a.

The hearing on the reasonableness of the settlement was full and fair. Indeed, no objector has ever challenged the fairness of the District Court's careful and thorough procedures for the submission and consideration of evidence on this issue.

7. On December 16, 1993, the District Court issued an extensive Memorandum and Order approving the proposed settlement as fair and adequate. App. 113a-140a. In the same order, the court confirmed its prior order certifying the class for settlement purposes only and dismissed the action with prejudice against all class members who had not requested to be excluded from the settlement class. *Id.* 114a.

In judging the settlement to be fair and adequate, the District Court meticulously applied the nine factors that the Third Circuit laid down in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), to structure that inquiry.[2] Specifically, the District Court made the following important factual findings:

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[2] These specific findings, which are acknowledged to be "factual" findings, are: (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. *See* App. 117a (citing *Girsh*, 521 F.2d at 157); *see also infra* page 24.

a. Although the court noted that the settlement was first proposed by the parties only eight months after the class actions were filed, it specifically found that "class counsel performed substantial discovery, reviewed even more extensive discovery that had been conducted in prior similar litigation, and considered all of this discovery when negotiating the proposed class settlement." App. 120a. The court also found that "the complexity, expense and likely duration of the litigation" that would result if the settlement were disapproved would be "mammoth" (*id.* 118a), and that the plaintiffs' possible recovery, if any, would be "substantial[ly] delayed" for "years" (*id.*).

b. With respect to the merits of plaintiffs' case, the District Court found that "the risks of establishing liability are *clearly substantial*." App. 120a (emphasis added). In support of this finding, the court pointed to a number of obvious and likely fatal weaknesses in the plaintiffs' claims. First, the court found that since the evidence showed that "there has been publicity [about the location of the fuel tanks on the C/K pickups] since the early 1980s," the plaintiffs would have a real "problem" avoiding statute of limitations bars. *Id.* 122a. Second, the court found that the Lanham Act claims would likely fail because, under controlling Third Circuit law, consumers lack standing to pursue such a claim. *Id.* 122a. Third, the court found that the Magnuson-Moss Act and implied warranty claims would likely fail for many plaintiffs who were not in vertical privity with General Motors because they purchased their trucks from independent dealers or other third parties. *Id.*

The District Court also made a number of findings with respect to the obvious factual weaknesses in plaintiffs' claims. The court noted that, factually, plaintiffs' claims rested heavily on the uncorroborated testimony of a disgruntled former General Motors employee, Ronald Elwell, who testified in a recent products liability action, contrary to his consistent testimony while in General Motors' employ, that General Motors had conducted crash tests in the early 1980s and reached the conclusion that its design could not be defended. The court found that Elwell's uncorroborated testimony was

contrary to the wealth of statistical evidence maintained by state and federal agencies, and submitted by General Motors, which showed that the performance of the C/K pickups in side-impact collisions "compares favorably with Ford and Dodge trucks of the same size for the same model years" and is better, on average, than that of small pickup trucks and passenger cars. App. 122a-123a. Moreover, the court found that when General Motors changed the location of the fuel tank, "there was no change exhibited in the fatality rate for the vehicles." *Id.* 122a.

c. The District Court also found that "[p]erhaps the greatest weakness in plaintiffs' case is the lack of proof of economic damages," which was the focus of their claims. App. 123a. The court found that "[a]n analysis of the *Kelly Blue Book*, recognized as one of the most reliable sources as to a vehicle's value, reveals that in spite of all the adverse publicity about possible safety defects that [the C/K] pickup trucks have received over the past years, *there has been no diminution in the value of the C/K pickup trucks relative to comparable Ford and Dodge trucks.*" *Id.* 124a (emphasis added). The court also found that "[t]he objectors presented no countervailing evidence" as to possible diminution in the economic value of the trucks. *Id.* Indeed, the court found that *there is no proof that settlement class members have sustained any economic loss at all. Id.* 126a. The court thus concluded that the "risks of proving damages weigh *strongly* in favor of approval of the proposed class settlement." *Id.* 124a (emphasis added).

d. Another of the factual findings required by the Third Circuit in assessing a proposed settlement is the risk that the case could not be maintained as a class action. *Girsh*, 521 F.2d at 157. The District Court found a genuine risk that this case could not be maintained as a class action, which weighed in favor of approving the settlement. Specifically, the court found that class certification may be inappropriate for three reasons. First, plaintiffs' "state law claims such as breach of warranty, negligent misrepresentation, negligence and products liability may involve the application of the differing laws of all 50 states." App. 125a. Second, "the fact that C/K pickup trucks do not involve a single fuel tank system design," and, indeed, involve *several* different designs, militated against

maintaining a single class action. *Id.* Third, the "individualized proof of reliance or knowledge [that would be necessary to establish plaintiffs'] . . . claims . . . [for] fraud, negligent misrepresentation and breach of warranty" also militated against certification of the class for purposes of full-fledged litigation. *Id.*

e. In light of all these difficulties, particularly the absolute lack of any indication of economic damages, the District Court sensibly observed that "it could be argued that *any* type of economic recovery is in the best interest of the class" -- *i.e.*, that *any* consideration would be a good deal for claims most likely worth nothing at all. App. 126a. Nevertheless, the court went on to consider the economic value of the settlement and determined that *the uncontroverted proof* showed the aggregate settlement to be worth approximately two billion dollars to the class. In this regard, the court found "the economic value analysis prepared by Dr. Simonson [which estimated the settlement to be worth between $1.824 billion and $2.024 billion was] the most thorough and reasonable" evidence presented on the valuation issue. *Id.* 127a. The court therefore concluded that "a very substantial portion of class members will receive an economic benefit and thus it is a reasonable settlement." *Id.* 128a. Moreover, the court noted that though the objectors had sought to explain "why they should obtain 'more,' they never addressed the issue of why they should receive anything at all for a diminution in economic value of the trucks *since there was absolutely no proof of such diminution.*" *Id.* 134a (emphasis added).[3]

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[3] The District Court also addressed and rejected the arguments of various objectors that certain attributes of the certificates rendered them of no value to some class members. Specifically, the court rejected the argument of some objectors that the certificates would not be transferable based on the uncontradicted testimony of Dr. Simonson that a secondary market would develop in the $500 certificates (App. 129a), and that General Motors could negate the value of the certificates by raising truck prices because the record evidence showed that General Motors would lose market share if it did so. In any event, the court stated that it would maintain

f. Next, the District Court addressed why the fact that the settlement did not "fix" any alleged defect did not detract from its reasonableness. The court specifically found that no objector who complained on this point "has been able to come forth with a practical and safe modification for the trucks that has been designed, evaluated and tested." App. 135a. By contrast, the court noted, General Motors had presented substantial evidence that no "fix" was either necessary or feasible. *Id.* 135a-137a.

Moreover, the District Court noted that, based on existing case law, it appeared that a court did "not have the power to order a recall to effect [a] retrofit" (App. 135a), and that none of the objectors was able to cite a single case "which would support a court ordered recall in a private action" (*id.* 139a). Instead, "Congress has established a forum to resolve recall and retrofit issues in NHTSA," and any alleged right to such relief would properly be determined there. *Id.*

g. The District Court also stated that because fewer than "one-fourth of one percent" of class members had either raised objections to the settlement or elected to opt out, whereas seven times as many had already designated family members to receive their $1,000 certificate than had objected, this broad satisfaction with the proposed settlement would "strongly favor approval." App. 119a.

h. Finally, the District Court observed that, except for dismissing their dubious claim for economic loss damages, the settlement did not in any way impair the rights of those class members who had not elected to opt out of the case. Specifically, the court pointed out that the proposed settlement (i) "does not affect the rights of settlement class members to participate in any recall that NHTSA orders" (App. 139a); and

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jurisdiction over the enforcement of the settlement to ensure good faith compliance. *Id.* 131a. The court also rejected the suggestion that the settlement was not fair to government entities that owned fleets of pickup trucks, concluding that they would be able -- like individual owners -- to use the certificates themselves or sell them to third parties. *Id.* 132a-133a.

(ii) "does not dismiss any claims for personal injury or death" resulting from an accident involving a C/K pickup (*id.* 116a).

In short, the District Court determined that the settlement was reasonable because the class members got certificates with real economic value in exchange for the dismissal of claims for economic damages that seemed nearly impossible to establish.[4]

8. The Court of Appeals reversed in a 104-page opinion. It began by considering "whether it is ever proper to certify a class for settlement purposes only." App. 32a. After some discussion, the court concluded that settlement classes are permissible under Rule 23. *Id.* 50a. The court went on to hold, however, that in order to certify a class for purposes of approving a settlement negotiated by the parties, a district court must first make findings on the record that all the requirements of Rule 23 to certify a class for purposes of litigation are strictly met. *Id.* The Third Circuit explicitly rejected the approach followed by other Circuits (Fourth, Fifth, Ninth, and Eleventh) and a leading commentator that settlement classes may be authorized according to somewhat "liberalized criteria" or "lower standards," without ensuring that they strictly meet all the requirements for certifying litigation classes under Rule 23. *Id.* 57a-58a. The Court of Appeals frankly stated: "We disagree with this approach, championed primarily by Newberg. There is no language in the rule that can be read to authorize separate, liberalized criteria for settlement classes." *Id.* 57a.

The Court of Appeals also explicitly rejected the approach followed by the Second and Seventh Circuits, which treats a district court's determination that a settlement is fair and adequate to all class members as a permissible substitute for formal findings of the requirements for certifying a litigation class under Rule 23. App. 52a-53a ("We disagree both with this suggestion [that settlement classes may be certified without articulating or consciously applying Rule 23 tests] and with the

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[4] After the District Court approved the settlement, it issued orders on December 29, 1993 and February 2, 1994 that approved an award of attorneys' fees to plaintiffs' counsel as reasonable under both a lodestar analysis and the percentage of recovery method.

conclusion that a fairness determination is a surrogate for Rule 23 findings."). According to the Third Circuit, "the inquiry into the settlement's fairness cannot conceptually replace the inquiry into the propriety of class certification" as a litigation class under Rule 23. *Id.* 53a.

9. The Court of Appeals then proceeded to review the District Court's determination that the settlement was fair and adequate.[5] The Court of Appeals held that because the settlement was negotiated before the court had finally certified a class for litigation purposes, the settlement must be reviewed under a "heightened standard" that required "the parties to make a higher showing of fairness" to sustain the settlement. App. 74a-75a. Applying this "heightened standard" to the *Girsh* factors, the Court of Appeals held that "on the current record, this settlement clearly fails to meet the standards required for judicial approval." *Id.* 103a.[6] In so

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[5] Although the Court of Appeals vacated the District Court's certification of the settlement class, it went on to decide whether the settlement was fair and adequate because it left open the possibility that the settlement class could be certified on remand based on a "more developed record." App. 72a.

[6] While the case was under submission in the Court of Appeals, the career staff at NHTSA concluded that there was no evidence that the C/K pickups did not meet the applicable federal motor vehicle safety regulation (FMVSS 301, concerning fuel tank integrity in side-impact collisions), *see* Engineering Analysis EA-92-041, General Motors Pickup Truck Defect Investigation, Engineering Analysis Report and Initial Decision That the Subject Vehicles Contain a Safety-Related Defect, at vi (Dep't Transp. Oct. 17, 1994) (hereafter "Engineering Analysis"). NHTSA staff also recommended that the investigation into the safety of these vehicles be closed with no finding of defect, Letter from Mario A. Lauro, Jr., Deputy Inspector General, U.S. Dep't of Transp., to The Hon. Bob Carr, Chairman, Subcomm. on Transp. and Related Agencies of the House Comm. on Appropriations 6, 10 (Nov. 30, 1994) (hereafter "Inspector General Report"). Secretary of Transportation Federico Pena, however, overruled the career staff and issued an "initial decision" stating that, although the trucks met the applicable federal standard, it appeared

holding, the Court of Appeals baldly substituted its own speculation on critical factual issues for the explicit findings of the District Court, without overturning any of those findings -- which were conceded to be "factual" findings (*id.* 32a) -- as "clearly erroneous" under Rule 52. As we describe in Section III, *infra*, this was true, for example, on such crucial factual issues as valuation of the settlement, the risk of establishing liability and damages, and the extent of investigation and discovery performed before the agreed settlement was reached by the parties. On each of these issues, the Court of Appeals

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to him that the design of the trucks presented an unreasonable safety risk under federal law. *See* Engineering Analysis, *supra*, at vii.

On November 17, 1994, General Motors sued Secretary Pena on the ground that his initial decision was unlawful because, *inter alia*, (i) a vehicle that NHTSA finds meets the relevant federal safety standard cannot be deemed "defective" under federal law, and (ii) the Secretary had engaged in gross irregularities by overruling NHTSA. Two weeks later, the Inspector General's office concluded that, indeed, "[t]he Secretary's initial determination [was] contrary to the conclusions of NHTSA technical experts." Inspector General Report, *supra*, at 7.

Soon thereafter, the Government contacted General Motors and indicated that it wanted to try to settle General Motors' lawsuit and Secretary Pena's investigative action. On December 2, 1994, General Motors and Secretary Pena reached a settlement. Pursuant to the settlement, Secretary Pena vacated his initial determination that the C/K pickups were unsafe and closed the investigation with no finding of defect, and General Motors dismissed its lawsuit against the Secretary. General Motors and NHTSA also agreed to commit substantial sums of money to various projects to promote motor vehicle public safety. The settlement does not state, however, that any action is necessary with respect to the C/K pickups, nor does it require General Motors to take any such action. *See* Settlement Agreement Between the U.S. Dep't of Transp. and General Motors Corp., *General Motors Corp. v. Pena*, No. 94-CV-14668 DT (E.D. Mich., Mar. 7, 1995).

In reviewing the District Court's approval of the reasonableness of the settlement, the Court of Appeals did not address the implications of the NHTSA settlement proceedings.

erred by substituting its own nonevidentiary judgments for the District Court's factual findings concerning the proposed settlement.

10. On May 16, 1995, the Court of Appeals granted General Motors' motion to stay the mandate pending the filing of a petition for a writ of *certiorari* by June 29, 1995.

REASONS FOR GRANTING THE WRIT

The class action is an increasingly important method of resolving legal claims that are pursued on behalf of millions of individuals. Given that the vast majority of all legal claims -- including those asserted through the mechanism of the class action suit -- are resolved not by the comprehensive processes of litigation but by compromise and dismissal, the settlement of class action suits is an issue of obvious importance to the American legal system. Despite significant controversies that surround the proper approach that courts should take in facilitating the settlement of class litigation, the Court has never addressed any of these issues other than in cases involving awards of attorneys' fees.

This case presents two issues that have engendered such controversy and that affect *every* federal class action suit in which the parties are able to negotiate a proposed settlement, which must, under Rule 23(e), be submitted for the court's approval. The Third Circuit and the other lower courts disagree, *first*, about whether a district court may certify a class for purposes of settlement and approve a settlement reached by the parties without first resolving on the merits the separate issue of class certification for purposes of litigation under Rule 23. They disagree, *second*, about the proper legal test to be applied in deciding whether to approve the terms of a proposed settlement reached by the parties under Rule 23(e) as a fair and adequate compromise that finally resolves all the claims raised in the underlying litigation.

Each of these issues presents "an important question of federal law which has not been, but should be, settled by this Court." S. Ct. R. 10(c). The ultimate resolution of these issues will have serious consequences for the Court's longstanding

commitment to a beneficial policy of facilitating and promoting the agreed compromise and mutual reconciliation of legal disputes. In this case, for example, the clear effect of the decision below is to prohibit parties from settling class action suits in the early stages of the litigation, and to hamstring trial judges in exercising their discretion to determine that a proposed settlement reached by the parties is an entirely fair and adequate resolution of what may well be weak or uncertain legal claims. This is especially true insofar as the Court of Appeals here improperly substituted its own (nonevidentiary) judgments for the District Court's factual findings in reviewing the reasonableness of this proposed settlement. The vexatious effects of "strike suits" would be exacerbated under this approach, and the undesirable consequences for the limited resources of the federal courts -- both trial courts and appellate courts -- are manifest. In addition, the disagreement among the lower courts on these issues has severe ramifications for forum shopping in federal class action cases, especially those involving nationwide classes that often can be filed in virtually any federal court in the country.

This Court's review is needed to provide a uniform determination of these issues that profoundly affect federal litigation involving millions of individuals every year.

I. THE CIRCUITS ARE SPLIT OVER WHETHER A DISTRICT COURT MAY APPROVE THE SETTLEMENT OF A CLASS ACTION SUIT WITHOUT FIRST DECIDING ON THE MERITS THE SEPARATE ISSUE OF CLASS CERTIFICATION FOR PURPOSES OF LITIGATION.

The Court of Appeals in this case consciously and explicitly magnified an existing conflict among the lower courts about how they should address the issue of class certification under Rule 23 for purposes of a "settlement class" as opposed to a litigation class. As denoted by the courts, a "settlement class" is a class that is temporarily certified *for settlement purposes only*, pending negotiations by the parties over a possible settlement. In the event a fair and adequate

settlement is reached by the parties, the court then simply confirms its prior certification of the class for purposes of approving the settlement. In the event that no settlement is reached, the defendant retains the right to argue that formal class certification for purposes of litigation is inappropriate. By putting aside what often are intractable differences about whether the defined class is appropriate for purposes of full-blown litigation, the parties are enabled to explore settlement negotiations that may result in a compromise that obviates the need for litigation both on that issue and on the merits of the substantive claims.

In this case, the Third Circuit endorsed the use of settlement classes (App. 50a), but effectively negated this endorsement by holding that, in order to certify a class for purposes of approving a settlement negotiated by the parties, a district court must first find on the record that all the requirements of Rule 23 to certify a class for purposes of litigation are strictly met (*id.* 51a). In this respect, it explicitly rejected the approach followed by four Circuits and urged by a leading commentator that settlement classes may be authorized according to somewhat "liberalized criteria" or "lower standards," without ensuring that they strictly meet all requirements for certifying litigation classes. *Id.* 57a-58a. *See In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir.) (in deciding whether to certify a class, settlement is at least an important factor in favor and might even be "a ground for certification *per se*"), *cert. denied*, 493 U.S. 959 (1989); *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 208 (5th Cir. 1981) (settlement class approved, despite "significantly diverging interests," because class members had a common right in "achieving the maximum possible recovery for the class"), *cert. denied*, 456 U.S. 998 (1982); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 633 (9th Cir. 1982) ("certification issues raised by class action litigation that is resolved short of a decision on the merits must be viewed in a different light"), *cert. denied*, 459 U.S. 1217 (1983); *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1543 (11th Cir. 1987) ("In reviewing settlement certifications, a special standard has been employed."). *See also* 2 H. NEWBERG

& A. CONTE, NEWBERG ON CLASS ACTIONS §11.28, at 11-58 (3d ed. 1992). The Third Circuit expressly "disagree[d] with this approach," stating that Rule 23 cannot "be read to authorize separate, liberalized criteria for settlement classes." App. 59a-60a.

The Third Circuit also rejected the distinct approach followed by the Second and Seventh Circuits, which treats a district court's determination that a settlement is fair and adequate to all class members as a permissible substitute for formal findings of the requirements for certifying a litigation class under Rule 23. App. 52a-53a. *See, e.g., Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (satisfactory "showing of a settlement's fairness, reasonableness and adequacy" substitutes for Rule 23 findings), *cert. denied*, 464 U.S. 818 (1983); *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 681 (7th Cir. 1987) (certification procedure may not be necessary because any potential for abuse with settlement classes is "held in check by the requirement that the judge determine the fairness of the settlement"). Again, the Third Circuit was explicit on this point: "We disagree both with this suggestion [that settlement classes may be certified without articulating or consciously applying Rule 23 tests] and with the conclusion that a fairness determination is a surrogate for Rule 23 findings." App. 52a-53a. According to the Court of Appeals, "the inquiry into the settlement's fairness cannot conceptually replace the inquiry into the propriety of class certification." *Id.* 53a.

The clear effect of the Third Circuit's rigid approach to class certification for purposes of settling claims is to disserve the established public policy favoring the voluntary resolution of disputes. *See, e.g., Marek v. Chesny*, 473 U.S. 1, 10 (1985) ("settlements rather than litigation will serve the interests of plaintiffs as well as defendants"); *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts"). Indeed, in a case involving an award of attorneys' fees, this Court reversed an interpretation of Rule 23(e) that would have "reduc[ed] the attractiveness of settlement," thereby "forcing more cases to trial, unnecessarily

burdening the judicial system, and disserving . . . litigants." *Evans v. Jeff D.*, 475 U.S. 717, 732, 736-37 (1986).

By prohibiting parties from settling their differences without first requiring trial courts to determine the merits of the certification issue for purposes of litigating all claims, the Third Circuit's approach guarantees that parties will be unable to settle cases in the early stages of litigation. Indeed, this Court has previously cautioned that in cases where courts are called upon to "judge the fairness of a proposed compromise," they are to limit themselves to that assessment alone, and "not decide the merits of the case or resolve unsettled legal questions." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *see also Officers for Justice*, 688 F.2d at 625 ("Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements"). The evident and baleful consequence of the Third Circuit's approach will be to multiply what are already inordinately high litigation costs and to exacerbate the already heavy burdens on overtaxed judicial resources.

Moreover, this new-found, fundamentalist approach to Rule 23 is entirely unnecessary to protect the interests of any party. With respect to the defendant and the named plaintiffs, of course, their agreement to the proposed settlement embodies their views. Insofar as this approach is intended to protect absent class members, it bears emphasis that in (b)(3) class actions -- such as this one and as is true in most modern class actions -- those persons retain the unfettered right to opt out of any proposed settlement. *See, e.g., Mars Steel*, 834 F.2d at 681 (settlement classes are appropriate because "a suit begun as a class action may often and quite properly be settled as an individual action, that is, without preclusive effect on other members of the class"). Moreover, unlike the ordinary situation where absent class members are asked to compare the option of bringing their own case with their assessment of the uncertain prospects of the pending class action suit, here the absent class members can make a fully informed choice with

utter certainty, for they can compare the alternative of filing their own case with *a specific result* embodied in the proposed settlement.

In short, the Third Circuit has identified and consciously fostered a circuit split over the proper use of settlement classes under Rule 23. This disagreement has serious ramifications for class action suits nationwide, and thus for the resolution of claims on behalf of millions of individuals. The Court should grant plenary review to provide uniform treatment of this important legal issue.

II. THE COURTS OF APPEALS APPLY DIFFERENT LEGAL TESTS UNDER RULE 23(e) IN DECIDING WHETHER TO APPROVE A CLASS ACTION SETTLEMENT REACHED BY THE PARTIES AS FAIR, ADEQUATE, AND REASONABLE.

Under Rule 23(e), a "class action shall not be dismissed or compromised without the approval of the court," after providing notice of the proposed settlement "to all members of the class in such manner as the court directs." Accordingly, in this case the District Court gave notice of this proposed settlement to the approximately 5,700,000 class members, of whom only 6,450 raised any objection and 5,203 chose to opt out of the class action suit. App. 118a. After conducting an evidentiary hearing and receiving submissions from all parties and objectors, the trial court subsequently approved the proposed settlement as fair and adequate. The Court of Appeals reversed, however, in what can only be characterized as an unsympathetic and highly skeptical review of the settlement reached by the parties in this case. *See* Section III, *infra*. This difference of approach reflects a larger disagreement about whether courts should presume that a settlement by the parties is valid, absent evidence of fraud or collusion, or instead should undertake a more searching assessment before granting approval.

At one end of the spectrum are cases in which courts have observed that a settlement agreement negotiated at arm's-length by the parties is entitled to a presumption of validity, and that

courts are not lightly to substitute their own estimates and surmises for the considered judgment made by the parties themselves in compromising their differences. The Seventh Circuit has thus explained that the "fairness of a settlement of a legal dispute is like the adequacy of the consideration supporting a contractual promise: a matter best left to negotiation between the parties." *Mars Steel*, 834 F.2d at 681. Although judicial approval of a class action settlement is required in order to mitigate the potential principal-agent problem between counsel and their clients, "so many imponderables enter into the evaluation of a settlement" that a district court's decision to approve a settlement must be reviewed under a "deferential" standard. *Id.* at 681-82. As long as some plausible account can be given that the proposed settlement gives the plaintiffs "the expected value of their claim if it went to trial, net of the costs of trial," then it should be upheld by a reviewing court. *Id.* at 682-83.[7]

Similarly, the Second Circuit has stressed that "there are weighty justifications such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation," and so "a district court's disposition of a proposed class action settlement should be accorded considerable deference." *Weinberger*, 698 F.2d at 73. A reviewing court should undertake some comparison of the terms of the compromise with the likely rewards of litigation, but it cannot be intended "that, in order to avoid a trial, the judge must in effect conduct one." *Id.* at 74. Accordingly, courts should undertake only a "limited examination of the settlement's substantive terms" and should examine instead "the negotiating process by which the settlement was reached," requiring that "the compromise be the result of arm's-length negotiations and that plaintiffs' counsel have possessed the

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[7] *See also Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) (in reviewing negotiated consent decree, courts are to judge "the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement") (citing *Protective Comm. For Indep. Stockholders v. Anderson*, 390 U.S. 414, 424-25 (1968)).

experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests." *Id. See also In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292-93 (2d Cir. 1992) (settlement approved where case was complex and negotiation process included lengthy arm's-length discussions that were supervised by the district court), *cert. dismissed*, 113 S. Ct. 1070 (1993); *Feder v. Harrington*, 58 F.R.D. 171, 176 (S.D.N.Y. 1972) ("The court is in no position to substitute its judgment for that of honest competent attorneys who, after exhaustive discovery have made a determination that 16% of the realistic damages is a fair appraisal of their chances for ultimate success.").

These courts thus hold that deference should be given to any settlement proposal that is the product of arm's-length negotiations between the parties, in the absence of fraud or collusion, without reference to any specific list of required factors. As the *Manual for Complex Litigation, Second* aptly summarized this approach:

> The judge should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation, and a presumption of correctness is said to attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery. This standard is a useful guide; if the conditions for the presumption are met and the settlement is a sensible one that seems fair to class members, the settlement should usually be approved.

Id. §30.41 (1985). *See also Gottlieb v. Wiles*, 11 F.3d 1004, 1014-15 (10th Cir. 1993) (relevant considerations are strength of claims, the judgment of the parties, and "whether the proposed settlement was fairly and honestly negotiated"); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir.) (crucial points are the strength of the plaintiffs' claims on the merits and "the want of collusion in the settlement"), *cert. denied*, 424 U.S. 967 (1976).

This deferential approach to the review of class settlements is particularly appropriate in view of the inevitable hazards, delays, and expenses of litigation and the clear benefits of

securing an immediate and certain recovery by way of compromise. *See, e.g.*, *Marek*, 473 U.S. at 10; *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971). It is also consistent with this Court's statement, in a case involving judicial approval of a negotiated consent decree, that the court's refusal to grant approval has "serious consequences," namely denying the parties "the opportunity to compromise their claim" and depriving them of "the benefits of the settlement agreement they negotiated." *Carson*, 450 U.S. at 89.

At the other end of the spectrum are decisions, as in this case, where courts have formulated and applied specific multi-factor tests that pose a stringent hurdle for court approval of any settlement proposal to resolve class action claims. The Third Circuit applies a nine-factor test for assessing the fairness and adequacy of proposed class settlements: "(1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the settlement risks of litigation." App. 31a; *see also supra* note 2. Essentially the same approach has been adopted by the Fifth and Eleventh Circuits. *See Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir.) (reformulated as six-factor test), *cert. denied*, 459 U.S. 828 (1982); *Leverso v. SouthTrust Bank of Al.*, 18 F.3d 1527, 1530-31 (11th Cir. 1994) (same).

Even more important than the mere formulation of a specific multi-factor test, however, is the degree of deference to the trial court that different Circuits afford in applying the test. Multi-factor tests do not displace the need for the experienced, considered judgment of a trial judge who enjoys an intimate familiarity with the case. The Sixth and Ninth Circuits have set out multi-factor tests for assessing a proposed settlement, but at the same time have cautioned that the district court "enjoys wide discretion in assessing the weight *and applicability* of these factors." *Granada Investments, Inc. v.*

DWG Corp., 962 F.2d 1203, 1205-06 (6th Cir. 1992) (emphasis added); *Officers for Justice*, 688 F.2d at 625 (list of considerations is permissive, not mandatory, and the relative importance of any particular factor is discretionary in "each individual case"). Thus, the Ninth Circuit has held that "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties" is limited to the extent necessary to ensure "that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties." *Id.*; *see also Granada*, 962 F.2d at 1205 ("Absent evidence of fraud or collusion, such settlements are not to be trifled with.").

In contrast, the Third Circuit here demonstrated that its specific factors are to be applied with a rigor that displaces judgment. Indeed, the proposed settlement reached by the parties, far from bearing any presumption of validity, is to be approached from just the opposite direction: the "proponents of the settlement bear the burden of proving that these factors weigh in favor of approval." App. 31a-32a. It was this skeptical, "show me" approach that led the Court of Appeals to sweep aside the District Court's careful assessment of the proposed settlement without stating that any of the facts found by the District Court are clearly erroneous.

It is important to understand, moreover, that the Third Circuit's holding with respect to settlement classes has sharply magnified the disagreement among the lower courts on this issue also. In setting out its nine-factor test, the Court of Appeals reaffirmed that one factor to be considered is the risk that the suit may not be maintained as a class action. App. 32a. Yet it did not address the obvious inconsistency between this requirement, on the one hand, and its holding, on the other hand, that a settlement class cannot be certified at all unless the District Court finds on the record that the class does in fact satisfy the requirements under Rule 23 for certification as a litigation class. *See* Section I, *supra*. Thus, the Third Circuit's decision on this point significantly broadens the preexisting circuit conflict, by holding in effect that the risk of maintaining the suit as a class action is in itself *dispositive* rather than simply serving as one factor in its supposedly multi-factor test.

A significant consequence of the Third Circuit's approach is to increase the burden on scarce judicial resources -- for both trial courts and reviewing courts -- by hamstringing a district court's authority to approve settlements negotiated by the parties. It does so, once again, by disserving the beneficial public policy favoring the mutually agreed resolution of disputes. *See Evans*, 475 U.S. at 736-37; *id.* at 760 (Brennan, J., dissenting). Nor is this a case where, as in two of the Court's recent decisions, the strong public policy "favoring voluntary resolution of disputes," *Digital Equip. Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992, 2002 (1994), which supports "facilitation of settlement, with the resulting economies for the federal courts," *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 393 (1994), is ambiguous in application to the specific issue at hand. There can be no empirical question here that the voluntary resolution of disputes will be disserved by rigorous judicial second-guessing of settlements reached by the parties. It is also certain to multiply the vexatious effects of "strike suits" by ensuring that any class action litigation cannot be resolved quickly or inexpensively.

The most fundamental problem on both legal issues, however, is that different Circuits are addressing the proper resolution of class settlements in different ways. The resulting incentives for forum shopping -- particularly in nationwide class actions, where the plaintiffs generally can decide to file their claims in practically any venue in the country -- are irresistible. For this reason, it is particularly important that the Court provide uniform guidance for the lower courts in this highly significant area of the law.

III. A REVIEWING COURT MAY NOT SUBSTITUTE ITS OWN NONEVIDENTIARY JUDGMENTS FOR DISTRICT COURT FINDINGS OF FACT THAT UPHELD THE SETTLEMENT REACHED BY THE PARTIES AS FAIR AND ADEQUATE.

A number of courts have stressed that the role of an appellate court reviewing the trial court's decision to accept or reject a proposed settlement "is even more limited" than that of

a district court in the first instance; above all, appellate judges "are not to substitute [their own] notions of fairness for those of the district judge and the parties to the agreement." *Officers for Justice*, 688 F.2d at 625-26; *see also, e.g., Flinn*, 528 F.2d at 1173. This self-restraint is consistent with an appellate court's general obligation under Rule 52 to uphold the trial court's findings of fact unless it specifically condemns them as "clearly erroneous." *See, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); *Pullman Standard v. Swint*, 456 U.S. 273 (1982). In this case, however, the Third Circuit compounded its extremely aggressive approach to reviewing the terms of negotiated settlements approved by trial courts by repeatedly overstepping its proper bounds in reviewing the careful factual findings on which the District Court rested its decision. This was true, in particular, in the following important respects:

1. The Court of Appeals substituted its own speculation about the total value of the settlement for the expert valuation analysis performed by plaintiffs' expert Dr. Simonson, opining that "[i]n our view, . . . it is quite possible that holders [of certificates] will be unable to realize any significant value." App. 83a. Thus, for example, in evaluating the value of the $500 transfer certificates, Dr. Simonson explained how, in his opinion, a secondary market would likely develop in the certificates in which they could be sold for approximately $250. *Id.* 129a. The Court of Appeals discredited this pivotal evidence by simply speculating that "there is no assurance that a [secondary] market will develop" for the $500 certificates. *Id.* 82a. This is "junk economics," but more pertinently it represents a remarkable departure from the norms of the appellate process. The Court of Appeals pointed to no *evidence* in the record to support its counter-intuitive speculation that a secondary market would not develop. Moreover, the Court of Appeals acknowledged that the objectors had presented *no* testimony on valuation to counter Dr. Simonson's expert opinion that the settlement was worth approximately two billion dollars to class members in the aggregate. *Id.* 83a.

2. The Court of Appeals likewise substituted its judgment as to the risk that plaintiffs could establish liability, without ever questioning any of the factual findings the District

Court relied on to determine that plaintiffs faced a "substantial risk in establishing liability." App. 123a; *see id.* 120a-123a. Indeed, the Court of Appeals *conceded* that: (i) "it is not clear that plaintiffs could maintain [their] federal causes of action" without some proof that the trucks declined in value, which they did not according to the *Kelly Blue Book* (*id.* 94a); (ii) the trucks have complied with all applicable federal safety standards (*id.*); (iii) "data from actual accidents . . . failed to reveal any statistically significant differences in post-collision fires, injuries or deaths relative to Ford or Dodge full-sized pickups" (*id.*); and (iv) the individualized reliance required to establish many of plaintiffs' state-law claims "would seem to pose a substantial barrier to proving class-wide liability" (*id.*).

3. The Court of Appeals also substituted utter speculation for the District Court's findings and the record evidence concerning the risk that plaintiffs could not establish substantial economic damages. Again, the Court of Appeals conceded the central legal and factual points relied on by the District Court: (i) that other courts have rejected claims for breach of warranty based on diminished resale value (App. 97a); and (ii) that uncontradicted evidence from the *Kelly Blue Book* shows the C/K pickups have in fact suffered *no* diminution of value relative to other pickup trucks (*id.*). Nevertheless, the Court of Appeals hypothesized that plaintiffs might be able to come forth with some "alternative measure" of their supposed economic damages, despite their complete failure to submit any such evidence in the record. *Id.* 98a. The possible "alternative measure" actually mentioned by the Court -- the "cost of a retrofit" (*id.*) -- is particularly nonsensical, given that it had accepted the District Court's specific factual finding that no "consensus retrofit" had been identified that would work (*id.* 85a; *see also id.* 135a-137a).

4. The Court of Appeals also questioned whether plaintiffs' counsel had adequately investigated the merits of their clients' claims before agreeing to the settlement. App. 92a. Here, once again, the Court of Appeals conceded the District Court's relevant factual finding -- that plaintiffs' counsel had undertaken significant discovery and had reviewed even more extensive discovery from prior product liability

cases involving C/K pickups. *Id.* However, the Court of Appeals thought it "particularly noteworthy that the plaintiffs did not depose Ronald Elwell," a disgruntled former General Motors employee who has recently changed his longstanding testimony, given in many previous cases, about the safety of the C/K pickups. *Id.* The Court of Appeals apparently was unaware that a Michigan court has entered an injunction (after Elwell wrongfully disclosed privileged General Motors information) that bars Elwell from testifying, *including specifically by deposition*, in any case involving a General Motors product, *Elwell v. General Motors Corp.*, No. 91-115946NZ (Wayne County, Mich. Aug. 26, 1992), and that General Motors had invoked this injunction in moving to quash a subpoena directed to him in this case. This tell-tale oversight powerfully demonstrates the perils of appellate substitution of nonevidentiary speculation for trial-level, record-based factual findings.

The Court should identify and correct this overreaching. To ensure that class settlements are reviewed under appropriate and uniform legal standards, it is critical that a sound balance be struck between the respective roles of trial courts and reviewing courts. As the Ninth Circuit has observed, any proposed settlement "is not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators." *Officers for Justice*, 688 F.2d at 625 (emphasis in original). Yet on each of the above points, and especially taken as a whole, the Court of Appeals' decision in this case clearly exceeded this sensible limit upon a reviewing court's proper role. It also disregarded the Court's decisions in *Anderson* and *Pullman Standard*. By granting review of the questions presented in this case, the Court thus will also be afforded a valuable opportunity to clarify -- for bench and bar -- the proper extent of an appellate court's authority in this respect.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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